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I. Introduction

> For Pennsylvania, the right to education plan and its implementation has been a large and difficult undertaking. . . . And with every step forward we take, we are establishing new standards for all states in the Union in bringing the retarded into the mainstream of society.[1]

In the months immediately following the consent agreement entered in *Pennsylvania Association of Retarded Children v. Pennsylvania (PARC)*[2] during the Milton J. Shapp administration, the governor's words reflected the predominant, optimistic mood among proponents of equal educational opportunity for the handicapped. In retrospect, however, his boast was premature at best. Within two years of the *PARC* decree, an evaluation of the practical impact of the case told "an uneven tale."[3] Moreover, an August 4, 1974, internal memorandum of the Pennsylvania Department of Education stated that

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1. Shapp, *The Right to an Education for the Retarded in Pennsylvania,* 23 SYRACUSE L. REV. 1085, 1089 (1972).

2. 334 F. Supp. 1257 (E.D. Pa. 1971) (three judge panel), *approved and adopted,* 343 F. Supp. 279 (E.D. Pa. 1972) (three judge panel). *PARC* established the right of handicapped children in Pennsylvania to a free, appropriate public education.

The case has a tortuous procedural history. The complaint, filed in January 1971, alleged that certain Pennsylvania statutes violated the equal protection clause of the fourteenth amendment because their implementation denied handicapped children access to a public education. A three judge panel heard plaintiffs' motion for a preliminary injunction in August after the parties had expressed a desire to settle certain due process issues out of court. On June 18, the court approved the parties' stipulation to require a due process hearing before any mentally retarded child could be excluded from school or assigned to any special program.

The August 12, 1971, preliminary hearing considered the equal protection issues, after which the parties again communicated a wish to settle by agreement rather than judicial decision. On October 8, 1971, the court approved a consent agreement and stipulation and issued an order temporarily enjoining the defendants from applying the statutes at issue to deny the handicapped access to an education. A December hearing aired any objections to the agreements, and final arguments occurred in February 1972. An amended stipulation and amended consent agreement were approved and adopted on May 5, 1972.

3. Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals,* 62 CAL. L. REV. 40, 81 (1974). This study concluded that a change in legal standards does not necessarily translate into altered administrative behavior within the educational system. *Id.* at 112-15.

One commentator recently noted that "*PARC* is the latest of the civil rights pebbles to be dropped in the legal pool, and we have just begun to feel the ripples." Baugh, *Federal Legislation on Equal Educational Opportunity for the Handicapped,* 15 IDAHO L. REV. 65, 87 (1978). Nevertheless, as this comment suggests, the high expectations and subsequent inadequate

the Commonwealth was not keeping pace with other states in providing education for handicapped children.[4]

Placement of an exceptional child in a private school is a radical and expensive alternative to placement within the normal state educational apparatus.[5] Ideally, private school placement is undertaken only after a careful evaluation of the child's educational needs and a concomitant appraisal of the ability of the local school district to service those needs. In practice, this process entails a difficult balancing of state and private interests that often can only be accomplished in the courts.

This comment examines the exceptional child's statutory right[6] to an education in a private facility at public expense and gives particular attention to the *PARC* mandate of an appropriate education for all exceptional children.[7]

II. The Exceptional Child's Right to an Education in Pennsylvania: Historical Perspective

A. The PARC and Mills Decisions

The *PARC* and *Mills v. Board of Education of the District of Columbia*[8] cases represent the genesis of the exceptional child's right to an appropriate education. Both cases concerned handicapped children of school age who were categorized as "uneducable" and unable to profit from an educational program.[9] Plaintiffs in both ac-

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Commonwealth implementation of the *PARC* agreement justified the early, negative appraisals of its impact.

4. *See* Frederick L. v. Thomas, 419 F. Supp. 960, 968 (E.D. Pa. 1976). The court in *Frederick L.* was informed that the memorandum did not represent the official position of the Department of Education.

5. Private school placement may quarter the child in a residential school far from home and may also entail the child's first extended absence from familiar surroundings. A placement outside regularly funded programs, moreover, burdens the Commonwealth with additional expense.

6. PA. STAT. ANN. tit. 24, § 13-1372(3) (Purdon Supp. 1979-80). The term "right" may be construed differently by lawyers and psychologists. For example, the lawyer's understanding of powers, privileges, or guarantees awarded children under law may contrast with the mental health professional's preference to speak of the "enabling rights" of a child to develop and ultimately achieve full potential as a human being. Koocher, *Child Advocacy and Mental Health Professionals,* in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 84, 85-86 (P. Vardin & I. Brody ed. 1979).

7. Pennsylvania defines "exceptional children" as "children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes." PA. STAT. ANN. tit. 24, § 13-1371(1) (Purdon Supp. 1979-80). The definition is further refined at 22 PA. CODE §§ 13.1, 341.1. Gifted students are included in the definition of "exceptional children." *See also* Central York School Dist. v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 383, 399 A.2d 167 (1979).

8. 348 F. Supp. 866 (D.D.C. 1972).

9. Mills v. Board of Educ., 348 F. Supp. 866, 874 (D.D.C. 1972); Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. 279, 283 (E.D. Pa. 1972). Two years before *PARC* and *Mills*, the Second Circuit determined that a state could constitutionally exclude from its schools those children "whose handicaps prevented them from participating in

tions asserted equal protection and due process claims, alleging that state law, without provision for notice and a hearing, denied them access to public schools solely on the basis of handicapping conditions.[10]

The evidentiary basis of the final order, injunction, and consent agreement in *PARC* was that "all mentally retarded persons are capable of benefitting from a program of education and training."[11] The consent agreement thus provided access for all mentally retarded children to a free program of appropriate education and training in a "regular public school class" if feasible.[12]

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classes" provided that *all* handicapped children were denied access. McMillan v. Board of Educ., 430 F.2d 1145, 1149 (2d Cir. 1970).

The *PARC* and *Mills* cases have received extensive scholarly treatment. *See generally* L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION (1973); Alschuler, *Education for the Handicapped,* 7 J.L. & EDUC. 523 (1978); Baugh, *supra* note 3; Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education,* 50 TEMP. L.Q. 961 (1977); Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded,* 23 SYRACUSE L. REV. 995 (1972); Schwartz, *The Education of Handicapped Children: Emerging Legal Doctrines,* 7 CLEARINGHOUSE REV. 125 (1973); Comment, *The Handicapped Child Has a Right to an Appropriate Education,* 55 NEB. L. REV. 637 (1976) [hereinafter cited as *Appropriate Education*]; Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded,* 34 OHIO ST. L.J. 554 (1973); Comment, *Educational Equality for the Mentally Retarded,* 23 SYRACUSE L. REV. 1141 (1972); Comment, *The Right to Education: A Constitutional Analysis,* 44 U. CIN. L. REV. 796 (1975).

10. 348 F. Supp. at 875-76; 343 F. Supp. at 283.

11. 343 F. Supp. at 307. The evidence consisted of the testimony of four experts in the field of education of retarded children. *Id.* at 285.

PARC is among the progeny of Brown v. Board of Educ., 347 U.S. 483 (1954), since both cases embraced the concept of education as a process of "socialization." *See Appropriate Education, supra* note 9, at 668-69. In a frequently cited passage in *Brown,* Chief Justice Warren articulated this theme:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values . . . and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. at 493. The *PARC* court echoed this theme *vis-a-vis* the handicapped:

> Experts agree that it is primarily the *school* which imposes the mentally-retarded label and concomitant stigmatization upon children, either initially or later on through a change in educational assignment. This follows from the fact that the school constitutes the first social institution with which the child comes into contact.

343 F. Supp. at 295.

12. 343 F. Supp. at 307. The agreement established a "general educational policy" that among educational program alternatives, "placement in a regular public school class is preferable to placement in a special public school class" and the latter "is preferable to placement in any other type of program of education and training." *Id. PARC* thus gave legal significance to the policy and practice of "mainstreaming," defined by the Commonwealth as "an educational process of maintaining or returning exceptional persons who can best profit from such placement, to the regular education classroom, with any needed supportive services being provided in accordance with the nature of the placement." 22 PA. CODE § 13.1. For a history of mainstreaming and an analysis of recent criticisms of its implementation, see Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975,* 92 HARV. L. REV. 1103, 1118-24 (1979).

In addition, a stipulation in *PARC* established due process safeguards to protect the rights of the handicapped student. 343 F. Supp. at 303-06.

The holding in *Mills* mirrored the constitutional basis of the consent agreement in *PARC*. The *Mills* court ruled that to afford a public education to the majority of children while excluding the handicapped was a denial of due process and equal protection.[13] The added significance of *Mills* lies in the court's rejection of the defense of insufficient financial resources. The court ordered that if sufficient funds are unavailable to finance all needed services, expenditures of existing resources must occur "equitably in such a manner that no [handicapped] child is entirely excluded from a publicly supported education . . . ."[14]

Although *PARC* and *Mills* were resolved on equal protection and due process grounds, the Supreme Court's decision in *San Antonio School District v. Rodriquez*[15] cast doubt on the viability of equal protection arguments in right to education cases. In holding that no fundamental right to education exists,[16] the *Rodriquez* Court apparently limited the usefulness of the equal protection tool in education cases.[17] *Rodriquez,* however, only concerned relative dispari-

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13. 348 F. Supp. at 874-75. The due process protections outlined went further than those promulgated in *PARC*. The *Mills* safeguards included: (1) notice to the parents of a proposed educational placement with the reasons for such placement; (2) the right of the parents to a hearing with representation if the proposed placement is opposed; (3) the right of the child to a representative of his own choice, including legal counsel; (4) the right of parental access to all documents relevant to the proposed placement; (5) the right of the parents to confront any public school official with knowledge of the proposed action; and (6) the right of appeal to a special committee of the Board of Education. 348 F. Supp. at 880-83. *Compare Mills with PARC,* 343 F. Supp. at 303-06 *and* Lebanks v. Spears, 60 F.R.D. 135, 140-49 (E.D. La. 1973).

14. 348 F. Supp. at 876.

15. 411 U.S. 1 (1973). Plaintiff-appellees, public school students from districts with a low property tax base, alleged that Texas' use of local property taxes as the method of funding public education favored the affluent and violated equal protection. Discrimination resulted because of significant differences in expenditures per pupil among the districts. The Court refused to apply the strict scrutiny standard and held that the Texas system bore a rational relationship to a legitimate state purpose. *See* note 17 *infra.*

16. 411 U.S. at 35.

17. Resolution of the "fundamental right" question (as well as that of the "suspect class," discussed in note 22 and accompanying text *infra*) impacts on the Court's standard of review in equal protection cases. If state action impinges on a fundamental right, or creates a suspect class, the Court applies a strict scrutiny analysis and requires demonstration of a compelling state interest. *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 30 (1968). If no fundamental interest is affected nor a suspect class created, the Court requires only that the state action bear a rational relation to a legitimate state interest. *See, e.g.,* San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 18-28, 29-39 (1972). *But see* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978) (rational relationship test applicable to alleged discrimination against student with spina bifida) and Cuyahoga County Ass'n for Retarded Children v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976) (rational relationship test applicable to state action excluding mentally handicapped children deemed unable to profit from further instruction from school), both demonstrate that if education is not viewed as a fundamental interest and if the handicapped do not constitute a suspect class, state actions restricting access of the handicapped to the schools will not be required to pass the demanding strict scrutiny test. *See generally* McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?,* 6 J.L. & EDUC. 159 (1977); Comment, *Equality of Education: Serrano v. Priest,* 58 VA. L. REV. 161 (1972).

See also Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded,* 434 U.S. 808 (1977). The class of plaintiffs in *Kruse* consisted of handicapped children and their

ties in the spending levels of various school districts and not a total deprivation of educational opportunity.[18] Commentators[19] and courts,[20] therefore, have agreed that the case does not preclude "a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."[21]

In resolving the suspect class issue, the *Rodriquez* Court defined as suspect a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[22] Applying this definition, the Court found that students from poor districts are not a suspect class.[23] The district court in *Fialkowski v. Shapp*[24] found, however, that retarded children fit the *Rodriquez* definition because they are excluded from the political process and are neglected by the state legislature.[25] Although the handicapped appear to fit the *Rodriquez* suspect class criteria, the Supreme Court appears unlikely to recognize this new suspect classification in the near future.[26]

Because the right of exceptional children to a free public educa-

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parents who were eligible for partial tuition assistance grants for education in private programs but who were too poor to pay that portion of the expense not covered by state aid. The district court concluded that this tuition grant system violated the fourteenth amendment's equal protection safeguards. The Supreme Court vacated and remanded with instructions to decide the case on the basis of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (amended 1978).

18. The Court implied that a different result might have occurred if the state's financing system "occasioned an absolute denial of educational opportunities to any of its children . . . ." 411 U.S. at 37.

19. *See, e.g.,* J. WILSON, RIGHTS OF ADOLESCENTS IN THE MENTAL HEALTH SYSTEM 161-62 (1978); Dimond & Reed, *Rodriquez and Retarded Children,* 2 J.L. & EDUC. 476 (1973); Haggerty & Sacks, *supra* note 9, at 976; Lindquist & Wise, *Developments in Education Litigation: Equal Protection,* 5 J.L. & EDUC. 1, 5-23 (1976); Note, *The Right of Handicapped Children to an Education: The Phoenix of Rodriquez,* 59 CORNELL L. REV. 519 (1974). *See also* Kutner, *Keys v. School District Number One: A Constitutional Right to Equal Educational Opportunity?,* 8 J.L. & EDUC. 1 (1979).

20. Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975); *In re* G.H., 218 N.W.2d 441 (N.D. 1974). *But see* Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

21. Fialkowski v. Shapp, 405 F. Supp. 946, 958 (E.D. Pa. 1975).

22. 411 U.S. at 28. *See* note 15 *supra.*

23. 411 U.S. at 28.

24. 405 F. Supp. 946 (E.D. Pa. 1975).

25. *Id.* at 959. This holding, however, has been widely criticized. *See, e.g.,* Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978); Doe v. Laconia Supervisory Union No. 30, 396 F. Supp. 1291 (D.N.H. 1975); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) ; Guempel v. State, 159 N.J. Super. 166, 387 A.2d 399 (1978); Levy v. City of New York, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976), all of which found no suspectness. *But see, In re* G.H., 218 N.W.2d 441 (N.D. 1974) (suspectness found).

Other courts have sidestepped the suspect class issue. *See, e.g.,* New York State Ass'n for Retarded Children v. Carey, 466 F. Supp. 487 (E.D.N.Y. 1979); Lora v. New York Bd. of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978).

26. Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA LAW. 855, 910 (1975); Note, *Mental Illness: A Suspect Classification?,* 83 YALE L.J. 1237, 1268 (1974).

tion received its initial impetus from case law founded primarily on the equal protection clause, the *Rodriquez* decision seems to qualify these case law guarantees of equal educational opportunity for the handicapped.[27] Fortunately, however, Congress has responded to the initial case law mandates and legislated major educational guarantees.

B. The Education for All Handicapped Children Act of 1975

The federal legislative response to *PARC* and *Mills* was the Education for All Handicapped Children Act of 1975 (EHCA or Act).[28] Passage of EHCA reflected congressional belief that the legislature "must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity."[29] The immediate purpose of the legislation was to afford financial aid to the states to provide educational services to handicapped children.[30] More importantly, EHCA sought to obviate the necessity for parents to utilize the courts to gain equal educational opportunity for their handicapped children.[31]

Funds under EHCA are conditioned on the creation of state plans for the identification and evaluation of all handicapped children,[32] and each state must also establish a comprehensive program ensuring a "free appropriate public education" to each of these children.[33] The legislation further mandates due process protections providing for parental input into educational placement decisions.[34] These protections essentially parallel those set forth in the *PARC* and *Mills* cases.[35] Basic parental rights include the right of notice before any change in educational placement and the right to a hear-

27. *See* Haggerty & Sacks, *supra* note 9, at 993-94; Lindquist & Wise, *supra* note 19, at 18.

28. Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1401-1461 (Cum. Supp. 1978)); 45 C.F.R. §§ 121a.1-.754 (1978). *See generally* Stafford, *Education for the Handicapped: A Senator's Perspective,* 3 VT. L. REV. 71 (1978); Note, *supra* note 12.

29. S. REP. NO. 94-168, 94th Cong., 1st Sess. 9, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1433.

30. *Id.* at 7-9, U.S. CODE CONG. & AD. NEWS at 1431-33.

31. *Id.* at 9, U.S. CODE CONG. & AD. NEWS at 1433.

32. The term "handicapped children" is defined at 20 U.S.C. § 1401(1) (Cum. Supp. 1978).

33. 20 U.S.C. § 1412(2)(A),(C) (Cum. Supp.1978). The Act provided the states with a timetable, necessitating each state desiring funds to submit a plan demonstrating that "a free appropriate public education" would be available by September 1, 1978, for all handicapped children between the ages of three and eighteen within the state. A state's eligibility is further conditioned upon extension of these services to twenty-one year olds by September 1, 1980. 20 U.S.C. § 1412(B) (Cum. Supp. 1978). *See, e.g.,* PENNSYLVANIA DEPARTMENT OF EDUCATION, FISCAL YEAR 1980 ANNUAL PROGRAM PLAN UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT AS AMENDED BY PUBLIC LAW 94-142 (1979).

34. 20 U.S.C. § 1415 (Cum. Supp. 1978); 45 C.F.R. §§ 121a.500-.593 (1978).

35. *See* note 13 *supra.*

ing to contest the proposed placement.[36] The outcome of the due process hearing is appealable to the state agency responsible for education and then to any state court of competent jurisdiction or federal district court.[37]

EHCA provides few guidelines defining "appropriate" education for the handicapped.[38] The only specific provision on appropriateness calls for an "individualized education program" (IEP), a written statement of such matters as educational goals, services, and scheduled evaluations prepared for each child.[39] On a broad policy level, EHCA requires that the state procedures ensure that handicapped children are educated with the nonhandicapped "to the maximum extent appropriate."[40]

Although EHCA is still in the early stages of its effective life, it has already evolved into the major vehicle for enforcement of the handicapped child's rights.[41] Litigation has predictably centered around disputes between parents and school authorities over what

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36. 20 U.S.C. § 1415(b)(1)(c), (2) (Cum. Supp. 1978); 45 C.F.R. §§ 121a.504-.506 (1978). Any party to a hearing has the right, *inter alia,* to: (1) obtain legal and expert (educational) counsel; (2) present evidence and confront and cross examine witnesses; (3) prohibit the introduction of evidence that has not been disclosed to the party at least five days prior to the hearing; (4) obtain a verbatim record of the hearing; and (5) obtain written findings of fact. Parties who are parents have a right to a public hearing. 20 U.S.C. § 1415(d) (Cum. Supp. 1978); 45 C.F.R. § 121a.508 (1978).

The due process procedures under EHCA apply only to financial aid received after October 1, 1977, and are not retroactive. *See* Stemple v. Board of Educ., 464 F. Supp. 258 (D. Md. 1979); Eberle v. Board of Pub. Educ., 444 F. Supp. 41 (W.D. Pa. 1977), *aff'd,* 582 F.2d 1274 (3d Cir. 1978).

37. 20 U.S.C. § 1415(c), (e)(2) (Cum. Supp. 1978); 45 C.F.R. §§ 121a.509-.511 (1978).

38. The term "free appropriate public education" is defined at 20 U.S.C. § 1401(18) (1978). As the definition indicates, the specifics concerning what constitutes "appropriateness" are left to the states.

39. An individualized education program is defined as

> a written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child . . . which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(19) (Cum. Supp. 1978).

40. 20 U.S.C. § 1412(5) (Cum. Supp. 1978). The provision mandates mainstreaming, or education in the "least restrictive environment," another legacy from *PARC. See* note 12 *supra. See also* Connors & Connors, *Children's Rights and Mainstreaming of the Handicapped,* in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 67, 74-75 (P. Vardin & I. Brody ed. 1979); Miller & Miller, *The Handicapped Child's Civil Right as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming,* 54 IND. L.J. 1 (1978); Stafford, *supra* note 28, at 76.

41. Actions to enforce rights of the handicapped to an education have also been brought under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (amended 1978). *See, e.g.,* New Mexico Ass'n for Retarded Citizens v. New Mexico, No. Civil 75- 633M (D.N.M., filed 1979); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979); Doe v. Mar-

constitutes an "appropriate" educational placement.[42] Thus, congressional expectations that EHCA would obviate the need for judicial involvement have not been achieved.

III. The Exceptional Child's Placement in an Approved Private School: Pennsylvania Procedure

The final order issuing from *PARC* enjoined the Commonwealth from applying various statutory provisions of the Public School Code of 1949[43] to postpone or deny exceptional children access to a free public education.[44] Pursuant to the *PARC* consent agreement, the Commonwealth assumed the task of identifying and evaluating all handicapped children[45] and, thereby, the affirmative duty of providing a free public education to all exceptional children.[46]

In the wake of *PARC,* an increased number of exceptional children were expected to seek educational services. Consequently, consideration immediately turned to "existing *private* facilities and resources in the *private* school sector" as valuable ancillary sources of educational programs.[47] Currently, detailed Pennsylvania procedures exist for placement of an exceptional child in an approved private school[48] at public expense.

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shall, 459 F. Supp. 1190 (S.D. Texas 1978); Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976).

Actions have also been brought under the civil rights statute at 42 U.S.C. § 1983 (Cum. Supp.1978). *See, e.g.,* Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971); Brown v. Kline, No. 78-2814 (E.D. Pa., filed Sept. 19, 1978); Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

42. *See, e.g.,* Pecunas v. Kline, No. 78-3133 (E.D. Pa., filed Sept. 19, 1978) placement of physically handicapped boy of normal intelligence in regular classroom contested by school district); Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979) (action by mother after "extensive efforts" by school district to find appropriate placement for emotionally disturbed child failed); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979) (suit brought after education and welfare agencies each disclaimed responsibility for placement of multiple-handicapped boy); Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979) (suit brought after alleged failure of school district to diagnose and take steps to remedy condition of a learning disabled child); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979) (suit brought after austistic child denied full-time tutor in his home by school district); Stemple v. Board of Educ., 464 F. Supp. 258 (D. Md. 1979) (placement of handicapped child in private school held premature for bringing action under EHCA for tuition reimbursement). *See also* Note, *supra* note 12, at 1125.

43. PA. STAT. ANN. tit. 24, §§ 13-1304; 13-1318; 13-1326; 13-1330(2); 13-1371(1); 13-1372(3); 13-1375; 13-1376 (Purdon 1962).

44. Pennsylvania Ass'n of Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972); 22 PA. CODE § 13.62. *See* PA. ATT'Y GEN. OP. No. 74 (1971).

45. 343 F. Supp. at 315.

46. The duty arising from *PARC* was later complemented by the provisions of EHCA, 20 U.S.C. §§ 1401-1461 (1978). *See* notes 28-42 and accompanying text *supra.*

47. PA. ATT'Y GEN. OP. No. 137 (1972) (emphasis added). EHCA also recognizes private schools as possible resources. *See* 20 U.S.C. § 1413(a)(4) (1978).

48. An "approved private school" is defined as a

> private school licensed by the State Board of Private Academic Schools when the specific special education program for certain exceptional handicapped persons is approved by the Secretary and is thereby eligible to receive payments for tuition, or

A. *Identification, Evaluation, and Placement of the Child*

Local school district officials are primarily responsible for locating and identifying all exceptional children within their districts.[49] All approved private schools are required to assist in the identification process by referring children "thought to be handicapped" to the school district of residence.[50] Each district school superintendent must refer every exceptional child in his district to the proper intermediate unit (IU)[51] prior to October 15 of each year.[52]

Local school districts also have the primary duty of providing an "appropriate" educational program for each exceptional child,[53] but if the district is unable to provide an effective, suitable program, the services of the intermediate unit are used.[54] When neither the district nor the intermediate unit is able to satisfactorily provide for the child, the district must consider suitable approved private schools as a placement alternative.[55]

Before an exceptional child is assigned to or denied any special education program, including placement in an approved private school, the district must conduct an evaluation of the child.[56] Evalu-

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tuition and maintenance, from funds of the school district or the Commonwealth, or both.

22 PA. CODE § 171.11. Private schools must apply for "approved" status. *Id.* § 171.23.

The Department of Education approves additional private school programs when it appears that these programs cannot be provided by an agency of the Commonwealth. *Id.* § 171.12(b). The Department, however, does not have an affirmative duty to act upon applications for "approved" status. Summit School, Inc. v. Commonwealth, Dep't of Educ., 43 Pa. Commw. Ct. 623, 402 A.2d 1142 (1979).

A complete list of approved piivate schools is published annually by the Department of Education pursuant to 22 PA. CODE § 171.12(c). Schools are listed therein according to the special programs they offer for handling specific handicapping conditions. *See* PENNSYLVANIA DEPARTMENT OF EDUCATION, APPROVED PRIVATE SCHOOL LISTINGS (1978).

49. PA. STAT. ANN. tit. 24, § 13-1371(2) (Purdon Supp. 1979-80); 22 PA. CODE § 341.12. Districts are required to indicate in policy statements those "group screening instruments" used to identify exceptional children. The instruments include standard achievement tests, speech and language tests, and visual and hearing examinations administered in accordance with PA. STAT. ANN. tit. 24, §§ 14-1401-14-1422 (Purdon 1962). 22 PA. CODE § 341.12(c).

50. 22 PA. CODE § 171.14.

51. The term "intermediate unit" is defined by federal statute as "any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established . . . for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State." 20 U.S.C. § 1401(22) (1978). Pennsylvania's twenty-nine intermediate units have the duty to provide, administer, and maintain "such additional classes or schools as are necessary or to otherwise provide for the proper education and training for all exceptional children who are not enrolled in classes or schools maintained and operated by school districts . . . ." PA. STAT. ANN. tit. 24, § 13-1372(4) (Purdon Supp. 1979-80).

52. PA. STAT. ANN. tit. 24, § 13-1371(2) (Purdon Supp. 1979-80).

53. *Id.* § 13-1372(3); 22 PA. CODE § 171.13. *See* West Chester Area School Dist. v. Commonwealth, Secretary of Educ., 43 Pa. Commw. Ct. 14, 401 A.2d 600 (1979).

54. 22 PA. CODE § 171.13.

55. PA. STAT. ANN. tit. 24, § 13-1372(3) (Purdon Supp. 1979-80); 22 PA. CODE §§ 171.12(a); 171.13. *See also* Summit School, Inc. v. Commonwealth, Dep't of Educ., 43 Pa. Commw. Ct. 623, 628, 402 A.2d 1142, 1145 (1979); PA. ATT'Y GEN. OP. No. 137 (1972).

56. 22 PA. CODE §§ 171.15(a); 341.13(a).

ations consist chiefly of comprehensive psycho-educational testing,[57] which parents may request without charge by the school district or which they may elect to purchase from other sources.[58] In the event an outside evaluation is obtained, the school district may conduct supplementary tests before recommending an appropriate program.[59]

A school district may conclude that an approved private school assignment is warranted.[60] An IEP conference must, however, precede any assignment or change in educational placement in order to formulate educational goals and timetables for the exceptional child, to determine specific services to be provided, and to allow for parental participation as to the disposition of the child.[61] The product of the conference is a written IEP.[62]

When the school district recommends a private school placement, the district superintendent must certify to the Department of Education that a "priority order of educational placement" has been followed.[63] A student cannot be assigned to an approved private school if his educational needs can be satisfied through placement in a higher tier.

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57. *Id.* §§ 171.15(d); 341.13(c),(d).

58. *Id.* §§ 171.15(b),(c). Evaluations can be quite expensive. *See* Note, *supra* note 12, at 1112 n.59. Massachusetts and New York afford parents the right to an outside independent evaluation at public expense. *See* MASS. GEN. LAWS ANN. ch. 71B, § 3 (West Supp. 1979); 8 N.Y.C.R.R. § 200.5(b)(2) (1978) (regulations promulgated by New York's Commissioner of Education). *See also* Comment, *Educating New York's Handicapped Children,* 43 ALB. L. REV. 95, 112 (1978).

59. 22 PA. CODE § 171.15(c).

60. *Id.* § 171.16(b). The reviewers must conclude that neither the district nor the IU is able to provide an appropriate education program before recommending private school placement. *See* Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979); West Chester Area School Dist. v. Commonwealth, Secretary of Educ., 43 Pa. Commw. Ct. 14, 401 A.2d 610 (1979).

61. 22 PA. CODE §§ 341.15-.16. Conference participants include a representative of the school district or IU, a teacher or potential teacher of the exceptional child, the child's parents, and the child if his presence is appropriate. *Id.* § 341.16(a). At a minimum, an annual review of the child's education program is required. *Id.* § 341.17. *See* Eberle v. Board of Pub. Educ., 444 F. Supp. 41, 44 (W.D. Pa. 1977); Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 68, 403 A.2d 142, 145 (1979).

62. *See* note 39 and accompanying text *supra.*

63. 22 PA. CODE § 171.16(c). The "priority order of placement" is essentially a procedural device designed to implement mainstreaming, and the various priority stages represent the range of possible educational placements in descending order of "desirability." West Chester Area School Dist. v. Commonwealth, Secretary of Educ., 43 Pa. Commw. Ct. 14, 18, 401 A.2d 610, 612 (1979).

The priority tiers are as follows: (1) placement in a regular class in a regular school; (2) placement in a school district special education program in a regular school; (3) placement in a district special education program in a special facility; (4) placement in an intermediate program in a regular school; (5) placement in an intermediate program in a special facility; and (6) placement in an approved private school program. 22 PA. CODE § 171.16(c).

The "priority order of placement" scheme is also known as the "Cascade System." The largest number of children are placed in the first level, the regular school classroom. Progressing down the order, gradually smaller numbers of exceptional children requiring greater services are relegated to each tier. Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue,* 23 SYRACUSE L. REV. 1037, 1039-41 (1972).

When assignment to an approved private school is recommended, the school district notifies the parents and forwards an application for placement to the Department of Education for approval.[64] The Department must approve or disallow the application within fifteen days of receipt. If the Department fails to act within the prescribed period, the application is regarded as approved.[65]

B. Financial Provisions

When an exceptional child is enrolled in an approved private school with Department of Education approbation, the school district assumes twenty-five percent of the allowable costs, and the Commonwealth furnishes the balance. Qualifications, however, exist to this apparently simple funding arrangement.[66]

"Tuition and maintenance" are the only allowable costs under existing state law.[67] Until recently, state funds were only available to cover a 180-day school year.[68] Moreover, ceilings are imposed on state payments of the costs of tuition and maintenance.[69] Parents

64. 22 PA. CODE § 171.16(e).

65. *Id.* § 171.16(g)(1). The Department may disapprove an assignment even if the parents and school district agree on its propriety. *Id.* § 171.16(g)(2). The Department will approve an application for a private school placement only if: (1) the priority order of placement requirement has been satisfied; (2) the requirement of mainstreaming has been met; (3) a change in the child's prior placement is justified; (4) the child's primary handicap has been correctly categorized; and (5) the program of the private school is appropriate for the child. Brief for Appellee [Department of Education] at 12, Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979).

66. PA. STAT. ANN. tit. 24, § 13-1376(a) (Purdon Supp. 1979-80). Only those exceptional children with certain handicapping conditions are eligible for approved private school placement at public expense. The "approved" handicaps are blindness or deafness, cerebral palsy, brain damage, muscular dystrophy, mental retardation, and social and emotional disturbances. *Id.* Thus, certain classes of children defined as "exceptional" under 22 PA. CODE §§ 13.1, 341.1 are denied right of access to approved private schools. These classes consist of the learning disabled and the gifted. The denial of the right to learning disabled children may be a violation of federal law under provisions of EHCA. *See* EDUCATION LAW CENTER, INC., RIGHT TO SPECIAL EDUCATION IN PENNSYLVANIA 9, n.6 (1979).

67. PA. STAT. ANN. tit. 24, § 13-1376(a) (Purdon Supp. 1979-80). The Commonwealth defines "maintenance" as "board, lodging, supervision, and other activities that are reasonably necessary to sustain the physical well-being of the child while in residence." 22 PA. CODE § 171.11.

The phrase "tuition and maintenance" is, at best, an inadequate description of the type of care required by the special needs of exceptional children. *Cf. In re* G.H., 218 N.W.2d 441, 445 (N.D. 1974) (in which the Supreme Court of North Dakota considered the terms "subsistence and tuition").

68. PA. STAT. ANN. tit. 24, § 13-1376(a) (Purdon Supp. 1979-80). "School year" is defined at 22 PA. CODE § 171.11. In Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), the plaintiffs successfully challenged the 180-day funding limit.

69. PA. STAT. ANN. tit. 24, § 13-1376(a) (Purdon Supp. 1979-80). For example, an $8,500 yearly ceiling on tuition and maintenance funds exists for eligible exceptional children enrolled in residential programs at approved private schools, with lesser amounts approved for students enrolled in private day schools. *Id.* Ceiling increases are authorized for multihandicapped children. *Id.* § 13-1376(f).

In Halderman v. Pittenger, 391 F. Supp. 872 (E.D. Pa. 1975), allegedly exceptional children challenged the funding ceilings as a denial of equal protection. The court found the

may purchase additional "optional services" provided by private schools to supplement their child's education.[70]

C. Due Process Protections

The parents' right to notice vests automatically when the school district decides to alter the educational status of the exceptional child.[71] Notice to the parents is required whenever the district elects to take any of the following actions: an initial evaluation or subsequent reevaluation; a change in the classification of the handicapping condition;[72] a revision of the IEP; or a change in educational placement. When notified of a proposed change in the educational status of his child, a parent may initiate due process procedures if he disagrees with the contemplated change.[73] The parent's initial step is to request the convening of a "program placement conference," the goal of which is an amicable agreement between the parties on the contested assignment.[74]

The parent may subsequently request a due process hearing if the conference fails to resolve the disagreement.[75] At the hearing, chaired by an appointee of the Secretary of Education, the parent has the right to present evidence and testimony contesting the proposed change in educational status,[76] and any change "shall be approved only if supported by substantial evidence on the whole record of the hearing."[77] The hearing officer forwards his findings and recommendations to the Secretary of Education for final disposition.[78] The Secretary's decision may be appealed to Commonwealth

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plaintiffs' claims "sufficiently substantial" to require the convening of a three-judge panel pursuant to 28 U.S.C. §§ 2281, 2284. *Id.*

70. PA. STAT. ANN. tit. 24, § 13-1376(d) (Purdon Supp. 1979-80); 22 PA. CODE § 171.16(f). "Payments for optional services" are defined as "charges for programs and services offered directly to parents which are not part of the program of instruction and maintenance appropriate to the needs of the child or not part of the normal school year." *Id.* § 171.11. *See* O'Grady v. Centennial School Dist., 43 Pa. Commw. Ct. 287, 294, 401 A.2d 1388, 1391 (1979).

71. 22 PA. CODE § 13.32(1), (2).

72. The particular handicap classification given to the exceptional child bears directly on the right to placement in an approved private school. *See* Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979). *See* note 66 *supra.*

73. 22 PA. CODE § 13.33.

74. *Id.* § 13.32(8). In preparing for the conference, the parent has the right to request a complete evaluation of his child and to receive all documents and tests relating to the proposed change. *Id.* § 13.32(4), (5).

75. *Id.* § 13.32(9).

76. The conduct of the hearing and the rights of the parties are set forth at *id.* § 13.32(9)-(23).

77. *Id.* § 13.32(15). The hearing officer is not the ultimate factfinder, but functions as the "designee of the agency head, charged with the responsibility to conduct a hearing, hear evidence, make findings, and submit a *proposed report* to the agency head . . . ." Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 376, 403 A.2d 138, 141 (1979) (emphasis in the original).

78. 1 PA. CODE § 35.187; 22 PA. CODE § 1.6.

Court[79] or to federal district court.[80]

IV. Problems Inherent in "Interest Balancing"

A cursory analysis of the preceding statutory scheme suggests that an efficient mechanism exists for the realization of educational opportunity for the handicapped child. Unfortunately, the realities of statute implementation rarely conform to that mechanical efficiency envisioned by legislative drafters. Rarer still is achievement of the moral or ethical element aspired to by proponents of rights for the handicapped.[81]

The implementation of laws designed to secure educational opportunities for exceptional children entails a complex process of compromise or "interest balancing."[82] The educational placement decision affects the vital interests of the child and his parents, the parents of "normal" children, and the education bureaucracy.[83]

These disparate interests often clash, and special attention must be directed to the apparent failure of the law to delineate the precise rights and responsibilities of the private and public entities concerned.[84] This shortcoming is highlighted when combined with the realization that the state is increasingly intruding into education, an area reserved traditionally to parents.[85] The current situation is typi-

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79. 42 PA. CONS. STAT. ANN. § 763(a) (Purdon 1979-80).

80. 20 U.S.C. § 1415(e)(2) (Cum. Supp. 1978).

81. Existing laws relating to the handicapped may "embody gross overreaction":

> Essentially, we are witnessing a tendency for society to project its own anxieties on a symbolic group—the fears of lack of impulse control and the fears of helplessness, dependency, and vulnerability. Many of our own existential conflicts are projected, by a rather primitive psychological mechanism, onto this entire [handicapped] population.

Roos, *Basic Personal and Civil Rights,* in THE MENTALLY RETARDED CITIZEN AND THE LAW 26, 27 (M. Kindred, J. Cohen, D. Penrod, T. Shaffer ed. 1976).

82. *See* Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification,* 121 U. PA. L. REV. 705, 780-85 (1973).

83. Difficulties arise when one attempts to justify the common assumption that the interests of the parents and their child are identical. Modern understanding of the intense psychological pressures attending the interrelationship of a family with an exceptional child may necessitate a challenge to the traditional notion that parents always act in the best interests of their children. *See id.*; Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues,* 48 NOTRE DAME LAW. 133, 143 (1972).

Many people with "normal" children see special education as competing with the needs of their offspring and argue that resources are better spent on those students who manifest visible and substantial progress in school. Exceptional children often do not display rapid educational gains in the conventional sense. As one unnamed legislator put it, "one cannot spend thousands of dollars to teach a child to brush his teeth." Benjamin & Blair, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience,* 11 CLEARINGHOUSE REV. 449, 455 (1977). School administrations also generally resist added expenditures for the introduction of new programs of instruction for special children. Kirp, *supra* note 82, at 780-85.

84. *See generally* Comment, *supra* note 58.

85. That the "nurture and upbringing" of children is primarily a parental responsibility has been a tenet consistently affirmed by the Supreme Court in education cases. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

fied by a recent brief prepared for a school district. After noting a mother's "well-intentioned, but frenetic and peripatetic applications to, and assaults upon, various [state] agencies" on behalf of her multihandicapped son, the solicitor concluded, "Without power in the parents to obstruct the process, there should be little or no problem."[86]

A. Inaction and Delay: Methods and Practices of Excluding Exceptional Children from School

Throughout his school career, seventeen-year-old Joseph Brown[87] was regularly evaluated by school district personnel, who noted signs of severe emotional disturbance. Although placement in a residential facility was recommended by the school psychologist in 1975, Joseph remained in a class for the mentally retarded at a regular high school and received no special educational services for his problem. During the 1976-77 school year, Joseph's mother received frequent complaints from school authorities concerning the boy's aberrant behavior, and in June 1977 school officials "advised" Mrs. Brown to remove her son from school. Joseph remained out of school through the fall semester of 1977 while his mother futilely sought another educational placement from the district. An IEP conference,[88] finally convened in April, 1978, resulted in a unanimous recommendation to place Joseph in a suitable private school. As of August 1978, however, Joseph remained excluded from *any* educational placement.

The plight of Joseph Brown is, unfortunately, not unique.[89] Handicapped children are routinely denied access to a beneficial education because of a variety of circumstances. "Disruptive" children may be suspended outright.[90] Parents may be "advised" to remove

86. Brief for Respondent [school district] at 1, 10, O'Grady v. Centennial School Dist., 43 Pa. Commw. Ct. 287, 401 A.2d 1388 (1979). To its credit, the Department of Education expressly refused to join in the *ad hominem* attacks of the school district against the mother. Brief for Respondent [Department] at 3, *id.*

87. The case history of Joseph Brown is reconstructed from factual allegations and exhibits contained in Complaint, Brown v. Kline, No. 78-2814 (E.D. Pa., filed August 23, 1978).

88. *See* notes 61-62 and accompanying text *supra.*

89. Minority groups in urban areas are particularly subject to this predicament. Research conducted by the Education Law Center, Inc., a public interest legal organization, disclosed that as of November 1977, 360 Hispanic school children in need of special education in the School District of Philadelphia were not receiving the needed services. Complaint at 16, Jesus Ivan M., No. _ (H.E.W., filed July 26, 1978). *See also* Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978); Schwartz, *supra* note 9, at 125.

90. *See, e.g.,* Complaint, Jesus Ivan M., No. _ (H.E.W., filed July 26, 1978). Jesus Ivan, a five-year-old Hispanic child thought to be handicapped, was sent home from a Philadelphia public school kindergarten two weeks into the 1977 fall semester. The following letter was sent to Jesus' mother from a school official:

> Please *do not send* Jesus Ivan, your son, to *Afternoon Kindergarten* any more until you get notice from [the] School.
> Jesus is very disruptive, behavior bad [sic] [and] teachers cannot put up with his

their children from school,[91] and evaluations, which are so crucial to an appropriate placement, may be ignored or never conducted.[92] The formulation of IEPs may often be delayed[93] or completely neglected.[94] Examination of the cases suggests that inaction and delay on the part of education officials result from bureaucratic lethargy, custom, and blind adherence to statutory dictates.[95] In *Brown v. Kline,*[96] for example, the plaintiffs alternatively alleged that failures and refusals to act on the part of district and Department of Education personnel constituted either official policy or widespread and persistent custom and usage.[97]

The Commonwealth Court of Pennsylvania has recently sanctioned official delays in educational placement. In *Savka v. Commonwealth, Department of Education,*[98] the court held that the Department of Education had authority to delay to the following school year the effective date of a child's transfer to an intermediate unit program when a determination of the appropriateness of the program was not made until November.[99] This holding has unfortunate implications beyond the educational costs to the child occa-

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actions. He spits on teachers [and] students. Kicks [sic] teachers—fights students calls bad names [sic] in Spanish [and] English.
We cannot have him in [school] at this time. Keep Jesus home until [the school] notifies you what they have worked out for him.

Id. (Exhibit A). The mother's repeated attempts to have her son returned to school were rebuffed, and when the boy was finally evaluated in January of 1978 Mrs. M. received no diagnosis or copies of evaluations. As of July 1978, Jesus Ivan was without an educational assignment. *Id.* at 5-6.

91. *See, e.g.,* note 87 and accompanying text *supra.*

92. *See, e.g.,* the cases of Jorge Mario R., Jorge Luis R., Miguel P., Carisa I.R., and Hiram S. in Complaint at 7-15, Jesus Ivan M., No. _ (H.E.W., filed July 26, 1978). Hiram S. was identified as a potentially handicapped child by his kindergarten teacher in May 1977. One year later, after legal intervention on his behalf, Hiram S. was finally scheduled for evaluation. The evaluating psychologist failed to keep the appointment, and as of July 1978 Hiram remained unevaluated. *Id.* at 14-15.

93. *See, e.g.,* the cases of Carisa I.R. and Sol. R. in *id.* at 11-14.

94. *See, e.g.,* Stubbs v. Kline, 463 F. Supp. 110, 113 (W.D. Pa. 1978); the case of Miguel P. in Complaint at 9-10, Jesus Ivan M., No. _ (H.E.W., filed July 26, 1978).

The Commonwealth solicited public comments on its 1980 education program plan submitted to the Department of Health, Education and Welfare as a condition for receiving funds under EHCA. *See* notes 32-33 and accompanying text *supra.* Various commentators, including parents and educators, noted a lack of adequate screening of children at the elementary level and expressed reservations on the quality of IEPs. "It was indicated that parents will have to be more informed, aggressive, and willing to spend a great deal of time and effort when seeking appropriate programs and services for their handicapped children." *See* PENNSYLVANIA DEPARTMENT OF EDUCATION, FISCAL YEAR 1980 ANNUAL PROGRAM PLAN UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT AS AMENDED BY PUBLIC LAW 94-142 app. E at 186-87 (1979).

95. *See* Bates, *The Right to an Appropriate Free Public Education,* in THE MENTALLY RETARDED CITIZEN AND THE LAW 267, 268 (M. Kindred, J. Cohen, D. Penrod, T. Shaffer ed. 1976).

96. No. 78-2814 (E.D. Pa., filed August 23, 1978).

97. Complaint at 14, *id.* Plaintiffs alleged that district officials were instructed by the Department of Education "not to recommend any child for a residential special education program regardless of that child's need for such a program." *Id.* at 13.

98. 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979).

99. *Id.* at 67, 403 A.2d at 145.

sioned by the delay. Parents may feel compelled to seek placement through other, less conventional channels. In *O'Grady v. Centennial School District,*[100] the parents of an exceptional child were forced to resort to a dependency adjudication[101] in an attempt to circumvent the delay in their son's education caused by their placement dispute with the school district.[102]

That exceptional children are denied an effective education through the use of a variety of "subtle" delaying tactics, including drug injections, is widely recognized.[103] Pennsylvania cases demonstrate that dilatory tactics may include postponement, suspension, or inclusion in an inappropriate program.[104] Program transfers and the placement of handicapped students on waiting lists for needed services are other manifestations of delay.[105] Prolonged litigation attempting to force officials to act may, however, only serve to exacerbate the problem.

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100. 43 Pa. Commw. Ct. 287, 401 A.2d 1388 (1979).

101. Under 42 PA. CONS. STAT. ANN. §§ 6301-6363 (Purdon 1979-80), legal custody of a child judged dependent (*i.e.*, "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals," may be granted to a state agency or private organization licensed to care for the child. In *O'Grady,* the parents' petition to Juvenile Court to have their son declared dependent was an attempt to secure his placement in an approved private school (as custodian) for brain damaged children. *See* Brief for Petitioners at 6, O'Grady v. Centennial School Dist., 43 Pa. Commw. Ct. 287, 401 A.2d 1388 (1979). The Department of Education asserted that a dependency adjudication effectively rendered moot a parent-initiated dispute then pending before it because custody of the child was in a third party. Brief for Respondent [Department of Education] at 6, *id.* The school district accordingly argued that it was not responsible for the minor-plaintiff's education because his legal custodian (a private school) was not located within its boundaries. Brief for Respondent [school district] at 9, *id.* The commonwealth court saw no merit in either argument and refused to allow the respondents to avoid their responsibilities. 43 Pa. Commw. Ct. at 294, 401 A.2d at 1391.

The use of dependency adjudications to secure educational placements for handicapped children is not uncommon. *See, e.g.,* North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979); Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va. 1977), *vacated and remanded,* 434 U.S. 808 (1977).

102. O'Grady v. Centennial School Dist., 43 Pa. Commw. Ct. 287, 401 A.2d 1388 (1979).

103. *See* Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education,* 36 OHIO ST. L.J. 349, 351 (1975); Jackson, *The Coerced Use of Ritalin for Behavior Control in Public Schools: Legal Challenges,* 10 CLEARINGHOUSE REV. 181 (1976); Weintraub & Abeson, *supra* note 63, at 1044.

104. Dilatory tactics, moreover, are not peculiar to Pennsylvania. *See, e.g.,* Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971); Harris v. Campbell, 472 F. Supp. 51 (E.D. Va. 1979); North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979); Pitts v. Board of Educ., 568 S.W.2d 595 (Mo. 1978).

In *Pitts,* for example, the court was forced to moot plaintiff's claims after four years of dispute because another round of remand evaluations and judicial review could not be completed before the boy was graduated, albeit with an inappropriate education, and rendered ineligible for special education programs. *Id.* at 596-97. The court determined that the school board made an error of law in refusing to assign the boy to a special education program. Nevertheless, the plaintiff's petition was "made moot . . . by the inability of the judicial process to render a judgment of any practical effect." The court was "disconcerted that this process of determinations has been so laggardly for so cogent a statutory purpose." *Id.* at 596.

105. *See, e.g.,* Mills v. Board of Educ., 348 F. Supp. 866, 869-70 (D.D.C. 1972). In *Mills,* handicapped children were placed on waiting lists for tuition grants and thus were effectively barred from any publicly supported educational program. *Id. See also* Handel, *supra* note 103.

B. Avoidance of Responsibility

Terrence Stubbs[106] began attending the Highland School, an approved private day school for socially and emotionally disturbed children, in November 1976. In August of 1977 the boy was unlawfully excluded from Highland in violation of established due process protections.[107] One month later Terrence's school district recommended his placement in another approved private facility, the Home for Crippled Children, and Terrence's mother approved the recommendation. From September 1977 through April 1978, the school district psychologist futilely sought interim placement for Terrence through the local IU. Neither the IU nor the Home endeavored to formulate the required IEP for Terrence.

During the winter of 1977-78, Terrence's mother requested and received a due process hearing on the continuing denial of educational services to her son. The hearing officer's decision of February 1978 called for placement of the boy in the Home as soon as possible, an interim placement, and the formulation of an IEP. In March the Department of Education received and approved the application for Terrence's placement in the Home. The mother filed suit in federal court and alleged that various violations of federal and state law[108] had culminated in denial of Terrence's education for the year 1977-78.

Judge Ziegler stated the obvious in the court's opinion in *Stubbs v. Kline*[109] when he noted that "the crux of this dispute concerns the nature and scope of the duties which apply to Terrence Stubbs."[110] The facts of *Stubbs* demonstrate a multi-tiered official avoidance of statutory responsibility.[111] Avoidance of duty is an element of inaction and delay and is, albeit ironically, predicated on rigid agency

106. The case history of Terrence Stubbs is described in Stubbs v. Kline, 463 F. Supp. 110, 112-13 (W.D. Pa. 1978).

107. 22 PA. CODE § 341.91(c) mandates procedural safeguards against "disciplinary exclusions" from approved private schools.

108. Plaintiffs' federal claims were filed pursuant to 20 U.S.C. §§ 1401-1416 (Cum. Supp. 1978) (EHCA) and 29 U.S.C. § 794 (Cum. Supp. 1978) (Rehabilitation Act). Pendant state claims were covered by PA. STAT. ANN. tit. 24, §§ 13-1371 to 13-1377 (Purdon Supp. 1979-80).

109. 463 F. Supp. 110 (W.D. Pa. 1978).

110. *Id.* at 117.

111. All institutions concerned denied responsibility for Terrence's education. The Home for Crippled Children argued that under applicable rules its duty to provide for the boy did not arise until the requirements of the Secretary of Education were fulfilled. The IU asserted that once Terrence's mother agreed to placement in a private school its responsibility for placement ceased. The Commonwealth urged that primary responsibility for providing Terrence with a free, appropriate education originated and remained with the local district and IU. *Id.*

Technically, the Home's position was correct. A Department of Education memorandum dated December 13, 1976, and distributed to directors of approved private schools stated:

> There can be no change in a student's assignment, including "public" assignment to a private school, until the notice and hearing procedures of the State Board of Education Regulations have been followed. In addition, because the Department of Education has final approval over placement of students to private schools, there can be no change in placement until the Department approval has been given.

perceptions of statutory duty. Unfortunately, exceptional children such as Terrence Stubbs often fall between the boundaries of officially perceived duties.

Disputes over which district or agency shall assume responsibility for the education of an exceptional child are becoming more common. Nationwide, these contests mirror the Pennsylvania experience and center on issues of residence,[112] educational disposition,[113] and finances.[114] Unfortunately, these disputes are fostered by the problems of allocating funds and services to meet the specialized needs of a group of persons as diverse as the handicapped.[115]

The educational establishment has been slow to respond to the needs of exceptional children. Furthermore, the response that has come from educators has resulted from judicial intervention.[116] Because of this apparent inability of the educational establishment to take the initiative, it seems likely that the handicapped placement system will continue its lethargic pace.[117] "As a generation of would-be educational reformers have learned to their sorrow, long entrenched school practices are not lightly tampered with."[118]

Memorandum from Pennsylvania Department of Education (Dec. 13, 1976), Record at 157a, Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 403 A.2d 138 (1979).

The IU never chose to exercise *any* responsibility because it refused to find an interim placement for Terrence and failed to formulate the required IEP. The IU violated its statutory duty under PA. STAT. ANN. tit. 24, § 13-1372(2) (Purdon Supp. 1979-80).

Responsibility for Terrence's exclusion from any educational program for the 1977-78 academic year must necessarily fall upon the Commonwealth if the educational guarantees originating in *PARC* are to be accorded validity. *See* notes 8-12 and accompanying text *supra*. Under the doctrine of primary jurisdiction, the *Stubbs* court stayed the action and remanded the plaintiffs' claims to the Department of Health, Education and Welfare. 463 F. Supp. at 117.

112. *See, e.g.,* William C. v. Board of Educ., 71 Ill. App. 3d 793, 390 N.E.2d 479 (1979); *In re* G.H., 218 N.W.2d 441 (N.D. 1974); Doe v. Kingery, _ W. Va. _, 203 S.E.2d 358 (1974).

113. *See, e.g.,* North v. District of Columbia Bd. of Educ., 471 F. Supp. 136 (D.D.C. 1979); Boxall v. Sequoia Union High School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979); Lombardi v. Nyquist, 63 App. Div. 2d 1058, 406 N.Y.S.2d 148 (1978); *In re* Lofft, 86 Misc. 2d 431, 383 N.Y.S.2d 142 (1976).

114. *See, e.g.,* State v. Stecher, 35 Conn. Supp. 501, 390 A.2d 408 (Super. Ct. 1977); *In re* Leitner, 40 App. Div. 2d 38, 337 N.Y.S.2d 267 (1972).

115. "Designing a comprehensive program to provide education for persons as diverse as the handicapped . . . is perhaps the most difficult educational problem facing society today." Harrison v. Michigan, 350 F. Supp. 846, 848 (E.D. Mich. 1972).

116. *Appropriate Education, supra* note 9, at 668.

117. The Commonwealth solicited public comments concerning its 1980 annual program plan prepared pursuant to the Education of All Handicapped Children Act. *See* note 94 and accompanying text *supra*; PENNSYLVANIA DEPARTMENT OF EDUCATION, FISCAL YEAR 1980 ANNUAL PROGRAM PLAN UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT AS AMENDED BY PUBLIC LAW 94-142, at 184-92 (1979). Despite numerous allegations of inadequacies and deficiencies in the Commonwealth's methods of identification, placement, and education of handicapped children, "the Pennsylvania Department of Education made no modifications prior to adopting the final plan." *Id.* at 215.

118. Kirp, *supra* note 82, at 794.

B. *Misclassification: Scylla and Charybdis Revisited*

Sharri Levy[119] began attending an approved private school for "brain injured" children in September 1969. In 1976 Sharri's parents requested that the local school district find a new placement for Sharri, who was approaching secondary school age. The district and IU determined that Sharri was "brain injured" and recommended the Vanguard School, an institution on the list of the Department of Education as a suitable facility for brain damaged children.

Mrs. Levy approved the placement, and Sharri was enrolled at Vanguard in September 1976. The school district then forwarded its favorable recommendation and a completed application to the Department of Education, which disapproved the application.[120] Subsequent to a due process hearing in January 1977, the Secretary determined that Sharri was "mentally retarded" rather than "brain injured." Thus, Vanguard was not considered a proper placement. On appeal, the commonwealth court reversed the Secretary's decision and found that reliance by the Department of Education on IQ tests as the sole criteria for its determination was a "blatant disregard of competent evidence establishing that [Sharri was] not mentally retarded, but . . . in fact, brain injured."[121]

The case illustrates the dangers of misclassification and incorrect labeling referred to in *PARC*.[122] In Pennsylvania, the right of any exceptional child to a free education in a private school depends totally on the child's handicap classification.[123] In Sharri Levy's case, disagreement on that classification placed the girl "between the Scylla of mental retardation and the Charybdis of brain injury."[124]

Initial classification by school district personnel can, however, serve legitimate purposes. A vital need exists to isolate and define a particular child's handicapping condition and mold a suitable educa-

119. The case history of Sharri Levy is reconstructed from the Record, Briefs, and Decision in Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979).

120. A number of students were enrolled before 1977 in private schools *prior* to receiving departmental approval. A memorandum sent to all school districts in December of 1976, however, noted this "confusion over the assignment procedures" and announced the Department's intent to actively monitor future private school placements. Enrollments completed initially without official approval were retroactively covered by tuition grants if approval was granted before February 1, 1977. Parents who enrolled their children in private schools without initial approval were required to sign an affidavit stating that the placement was made pursuant to school district recommendations. Memorandum from Pennsylvania Department of Education to School District Superintendents (Dec. 13, 1976), Record at 157a-160a, Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 403 A.2d 138 (1979).

121. Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 361, 399 A.2d 159, 162 (1979).

122. 343 F. Supp. 279, 295 (E.D. Pa. 1972).

123. *See* PA. STAT. ANN. tit. 24, § 13-1376 (Purdon Supp. 1979-80).

124. Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 357, 399 A.2d 159, 160 (1979). The judge refers to the six-headed monster (Scylla) and whirlpool (Charybdis) that imperiled Odysseus in Homer's *Odyssey*.

tional program around it.[125] The pervasiveness of classification,[126] however, means that mistakes are not uncommon.[127] The dangers inherent in classification, or "tracking," have consequently received studied attention from the courts.[128] Errors in labeling often lead to a "self-fulfilling prophecy" because the misclassified child performs to the depths of his official grouping.[129]

Levy v. Commonwealth, Department of Education represents an unusually blatant example of misclassification. Yet the case suggests other, more common systemic deficiencies. In general, *Levy* illustrates the insensitivity of a statutory classification scheme that channels admissions to private schools via rigid, ostensibly objective criteria. Although parents have a vital, if subjective, interest in the school to which their handicapped child may be assigned, they lack a genuine voice in the placement decision.[130] Local school districts are

125. *See* Schwartz, *supra* note 9, at 129. Even the most carefully conceived and executed classification schemes may serve a deleterious purpose. Labels, however validly placed, tend to "legitimize educational planning" by "assuming homogeneity of educational needs within traditional categories . . . ." Thus educational programs predicated on categories or groups may tend to ossify and become ineffective. *See* Connors & Connors, *supra* note 40, at 74.

126. "From primary school until graduation, most schools group (or track) students on the basis of estimated intellectual ability, both within classrooms . . . and in separate classes." Kirp, *supra* note 82, at 710.

127. *See, e.g., In re* Mecca, 369 N.Y.S.2d 282 (1975), in which "slip-shod and unsatisfactory" screening procedures resulted in the classification as handicapped of a boy with a behavior problem. After the boy's mother registered him at a private facility and sought tuition reimbursement, the reviewing court found the misclassification and denied reimbursement.

The drafters of EHCA were deeply concerned over the practices and problems of student classification. *See* S. REP. No. 94-168, 94th Cong., 1st Sess. 26, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1425, 1450. *See* notes 28-42 and accompanying text *supra.*

128. *See, e.g.,* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd,* 502 F.2d 963 (9th Cir. 1974) (school district enjoined from placing black students in classes for the educable mentally retarded when primary criterion for the classification was I.Q. test results); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.,* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *Hobson* was the first case in which standardized tests were successfully attacked. The court assailed the use of I.Q. tests as the cause of an unjust "tracking system" and ability grouping that denied plaintiff-students equal educational opportunity.

In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the Supreme Court considered the necessity of a due process hearing before a state stigmatizes a citizen through a classification scheme. The *PARC* court cited *Constantineau* for the proposition that due process safeguards must be available before a school stigmatizes a child by classifying him as handicapped. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 295 (E.D. Pa. 1972). *See also* Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd,* 456 F.2d 1285 (5th Cir. 1972), *cert. denied,* 409 U.S. 1013 (1972). *See generally* Sorgen, *Labeling and Classification,* in THE MENTALLY RETARDED CITIZEN AND THE LAW 214 (M. Kindred, J. Cohen, D. Penrod, T. Shaffer ed. 1976).

129. *See* Connors & Connors, *supra* note 40, at 73-74.

130. *See, e.g.,* the testimony of Edward Savka, father of a hearing impaired son, in Record at 232a-252a, Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979). *See also* the testimony of the parent in Record at 198a-200a, Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979).

The response of the Department of Education to these parental concerns is that exceptional children are not entitled to the *best* educational program. Rather, "an exceptional child in the Commonwealth is entitled to *an* appropriate program of special education at public expense." Brief for Respondent [Department of Education] at 12, Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979). *See also* the closing statement of counsel for the Department in Record at 268a-273a, Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979).

also prohibited from selecting "criteria which is not recognized in state regulations and standards as proper grounds for utilizing the approved private schools."[131] Thus, the present Pennsylvania statutory classification scheme fails to provide for a sensitive, flexible response to the interests of parents and local districts.[132]

C. *Family v. State: The Due Process Battleground*

Paul Pecunas, Jr.[133] is a child with tension athetoid cerebral palsy, an illness that requires confinement to a wheelchair and communication through an electronic language board. In January of 1978, when Paul was nine, his parents requested his placement in a regular classroom with supportive services for the following school year. The local school district and IU, however, recommended placement in a class for the physically handicapped. At a due process hearing the parents presented expert testimony on Paul's normal intelligence, academic functioning, and socialization. The hearing officer concluded, nevertheless, that the parents' evidence lacked "the expertise and precision of the District/IU position." Specifically, the evaluation of Paul by a private psychologist was given no weight because the expert was not a certified school psychologist.[134]

The Pecunas' dilemma illustrates the practical problems faced by exceptional children and their parents in utilizing due process procedures. Although parents have valuable statutory rights regarding a child's placement, they lack the ability to protect the child's legal interest fully,[135] a problem that manifests itself at all three agency stages of the due process scheme.[136]

1. Prehearing Stage.—Initially, parents may not even realize that due process procedures are available.[137] The parents' lack of knowledge may be subtly perpetuated by overreaching school offi-

131. Brief for Appellee at 23, Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979).

132. New York, in contrast, allows for a degree of autonomy at the local level in the implementation of the state's law for the education of the handicapped. Each board of education must establish a "committee on the handicapped" minimally composed of a school psychologist, a teacher of special education, a school physician, and a *parent* of a handicapped child. The committees have responsibility for identifying and recommending placements for handicapped children. *See* N.Y. EDUC. LAW § 4402 (McKinney Supp. 1979). *See generally* Comment, *supra* note 58.

133. The case history of Paul Pecunas is reconstructed through factual allegations and exhibits contained in Complaint, Pecunas v. Kline, No. 78-3133 (E.D. Pa., filed Sept. 19, 1978).

134. *Id.* at Exhibit A, 11.

135. Miller & Miller, *supra* note 40, at 27.

136. 20 U.S.C. § 1412(6) (1978) requires that the special education of handicapped children administered by *any* state or local agency be governed by the same due process safeguards required of the state's chief educational agency. Nevertheless, the Department of Education has decided that no due process hearing is necessary for detention center placement of a child found delinquent or socially deprived pursuant to the Juvenile Act. *See* Memorandum from Pennsylvania Department of Education, Legal Office (February 4, 1977).

137. *See, e.g.,* Complaint at 11, Brown v. Kline, No. 78-2814 (E.D. Pa., filed Aug. 23,

cials.[138] Moreover, even when parents know their procedural rights, they may be subject to school district or agency pressures designed to inhibit the exercise of those rights.[139]

The problem is especially acute when the parents are poor or lack education. Parents may be unaccustomed to, or fearful of, dealing with an educational establishment that employs incomprehensible standards and procedures. In addition, it may often be financially impossible for a parent to contest the child's educational placement.[140]

2. Hearing Stage.—At a due process hearing the initial burden of going forward with the evidence is on the school district, but the burden can be discharged by introducing into evidence the official report recommending a change in educational placement. The burden then shifts to the parents to introduce evidence and testimony to rebut the official recommendation. This obviously places a much greater burden on the parents.[141]

1978) in which plaintiffs allege that at no time during the period of her son's exclusion from school was Mrs. Brown apprised of her due process rights.

Although "a parent's involvement in a due process hearing provides an opportunity for familiarization with federal and state laws, regulations and standards," parents "may not always be informed" that they have certain rights or that certain requests should be presented in writing. "Parent training sessions" designed to inform parents of procedural safeguards represent one suggested solution to the knowledge problem. PENNSYLVANIA DEPARTMENT OF EDUCATION, FISCAL YEAR 1980 ANNUAL PROGRAM PLAN UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT AS AMENDED BY PUBLIC LAW 94-142, at 187 (1979).

138. One parent testified that at the first program placement conference with IU officials on the future of his son's education, "law" and "appropriate" were words that were used frequently. Record at 236a, Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979). The obvious implication is that the initial due process stage may be used to blunt parental meddling, while ignoring its statutorily mandated function to give the parent detailed information about the proposed educational change or modification. *See* 22 PA. CODE § 13.31(f)(1).

139. In Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), counsel for an exceptional child was "advised" by counsel for the Department of Education that any attempt to convene a due process hearing regarding the child's needs "would be futile." Complaint at 9, *id.*

140. *See* Lora v. Board of Educ., 456 F. Supp. 1211, 1294 (E.D.N.Y. 1978). *See also* Connors & Connors, *supra* note 40, at 71; Note, *supra* note 12, at 1110-11.

141. 22 PA. CODE § 13.32(15). In Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 403 A.2d 138 (1979), the IU satisfied its burden by submitting a general outline of a possible future program in support of its recommended placement. The hearing officer opined that the presentation of the IU did not indicate the existence of a well planned program. Record at 46a, *id.* Nevertheless, despite their presentation of expert witness testimony, the parents did not prevail because they "failed to establish that the District or IU could not provide an appropriate vocational program *if given the opportunity.*" 43 Pa. Commw. Ct. at 375, 403 A.2d at 141 (emphasis added).

In contrast, New York grants some original jurisdiction over mentally and physically handicapped children to its family courts. *See* N.Y. FAM. CT. ACT §§ 231, 232 (McKinney Supp. 1979). Thus, parents may sometimes avoid administrative agency procedure by appealing directly to the court for relief. In *In re* Peter H., 66 Misc. 2d 1097, 323 N.Y.S.2d 302 (1971), the family court refused to follow school district recommendations when it appeared that for three previous years the school had not provided a suitable program for the handicapped student. The court declined to allow the child's "entire future to be further jeopardized by gambling on a special educational system that [had] yet to prove itself." *Id.* at 1099, 323 N.Y.S.2d at 305. The court's decision stands in stark contrast to the administrative obfuscation in *Fitz.*

Parents have the right to present evidence at the hearing and may introduce testimony of expert medical, psychological, or educational witnesses.[142] In practice, however, parents are virtually powerless at this due process stage since they are usually not educational or medical professionals, and the subjective evidence[143] they can present at a hearing is of limited evidentiary value.[144] Even when the family can afford expert testimony, the system often deprives outside or private expert testimony of probative value.[145]

At the hearing stage, parents face an additional problem in the person of the hearing officer. Hearing officer assignments are made by the Department of Education, and the only qualification for assignment is that the individual must not be an "officer, employe, or agent of any school district or IU in which the person resides."[146] The practical effect of this solitary restriction is that hearing officers are selected from personnel employed by neighboring school districts and IUs.[147] Thus, the impartiality of the hearing officer is a significant issue.[148] In at least one case a parent argued that he was

142. 22 PA. CODE § 13.32(20).

143. *See* note 130 and accompanying text *supra.*

144. In one hearing, for example, the parents of an exceptional child offered evidence that their son had not been "progressing too well" in a program provided by the local school district. The Secretary of Education subsequently characterized the statement as "non-specific and insubstantial" and thus insufficient evidence of program inadequacy. Record at 10a-11a, Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 403 A.2d 138 (1979).

Also illustrative of the limited evidentiary value of parental testimony is the following excerpt from a description of the effect of the disputed placement of an exceptional child in Vanguard, an approved private school, by the child's mother:

> Well, Sharri has achieved for the first time in her life successes—successes in friendships, successes academically. . . . [S]he's happy to go to school. She's happy when she comes home. . . . She loves her surroundings. She's comfortable. . . . And she's just happy about all these new friendships. . . . She's in a very normal situation and its very—its good for her because she loves Vanguard and it shows in everything she does. She's a happy member of our family.

Record at 199a-200a, Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979). The subsequent opinion and order issued by the Secretary of Education made no mention of the mother's testimony in disapproving of Sharri's placement at Vanguard. *See* Record at 4a-8a, *id.*

145. *See, e.g.,* note 133 and accompanying text *supra.* Although parents may elect to procure outside evaluations by an approved private school, as the Pecunas did, these evaluations "may be supplemented by the school district . . . to the extent the district . . . deems necessary . . . ." *See* 22 PA. CODE § 171.15(c). Thus, when the district conducted its "supplementary" evaluations, the Pecunas family found that the evaluation of its expert was "of little public school concern" because it was performed by a private psychologist. *See* Complaint at (Exhibit A) 11, Pecunas v. Kline, No. 78-3133 (E.D. Pa., filed Sept. 19, 1978).

146. 22 PA. CODE § 13.32(12).

147. *See, e.g.,* Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979) (hearing officer was employee of neighboring IU); Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 403 A.2d 138 (1979) (hearing officer was an "instructional advisor" to a hearing impaired program of a neighboring IU); West Chester Area School Dist. v. Commonwealth, Secretary of Educ., 43 Pa. Commw. Ct. 14, 401 A.2d 610 (1979) (hearing officer was assistant director of special education for the Philadelphia School District).

148. Commentators concerned with 45 C.F.R. § 121a.507(1978), dealing with impartial hearing officer provisions, sought to have three-person panels, including parents, serve as hearing examiners, but federal regulations remain unchanged. *See* 45 C.F.R. § 121a, App. A (1978). *See also* Alschuler, *supra* note 9, at 532.

denied an impartial hearing because the hearing officer, an employee of an IU, was "an ally of the opposition."[149] The commonwealth court held, however, that the parent had waived the issue of the impartiality of the hearing officer by failing to raise it at the hearing.[150]

3. Post-Hearing Stage.—The Secretary of Education issues the final order in any educational placement adjudication, an order responsive to the proposed report submitted by the hearing officer.[151] Thus, the inherent defects of the hearing stage usually become apparent only after the hearing when the officer submits his report for final disposition.

Two factors militate against impartiality in the post-hearing, due process stage. First, the Department has wide discretion to approve or disapprove assignments to private schools, and an application for assignment may be disapproved even if the district and the parents both agree on its propriety.[152] Second, the Department is, essentially, the ultimate factfinder.[153] It reviews the case *de novo* on the basis of the record. Given these factors, it would be naive *not* to suggest that the Department may favor the testimony of witnesses familiar to it over that of unknown witnesses.[154]

4. The Agency Stages of Due Process: Conclusion.—The cases mandate the inescapable conclusion that the practical problems faced by exceptional children and their parents who seek to employ due process protections render the statutory safeguards meaningless. Fortunately, the cases also indicate that some parents have the

149. "At the hearing the parents are faced with a grave disappointment when they learn that this impartial hearing is being conducted by an ally of the opposition." Brief for Petitioner at 17, Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 403 A.2d 142 (1979).

150. Savka v. Commonwealth, Dep't of Educ., 44 Pa. Commw. Ct. 62, 68, 403 A.2d 142, 145 (1979).

151. 1 PA. CODE §§ 35.187, 35.226; 22 PA. CODE § 1.6.

152. 22 PA. CODE § 171.16(g)(2).

153. *See* Fitz v. Intermediate Unit # 29, 43 Pa. Commw. Ct. 370, 375-76, 403 A.2d 138, 141 (1979) (by implication).

154. Levy v. Commonwealth, Dep't of Educ., 41 Pa. Commw. Ct. 356, 399 A.2d 159 (1979), illustrates the dangers attendant to the discretionary powers of the Department as factfinder in the post-hearing stage. In *Levy,* the Secretary determined that the record disclosed no substantial evidence to warrant placement of the child in an approved private school for the "brain injured." Record at 8a (Opinion and Order of Secretary), *id.* The sole evidence of the Department at the hearing, however, consisted of the testimony of two witnesses, one of whom was a Department administrator with no experience or training in the area of learning disabilities. *Id.* at 243a (hearing transcript). Neither witness for the Department had ever tested, examined, or evaluated the child in question, but both had initially disapproved the private school placement. *Id.* at 249a. Yet, despite the testimony of a battery of expert witnesses presented by appellant - parents, witnesses who had clinical contact with the child and who recommended private placement, the Secretary disapproved the placement. The facts clearly support the charge that "the Secretary, without any stated justification, [gave] no substantial weight to the testimony of anyone but her own employees . . . ." Brief for Appellant at 21, *id.* The commonwealth court subsequently agreed with this charge and reversed the Secretary's order. 41 Pa. Commw. Ct. at 361, 399 A.2d at 162.

financial and emotional resources to carry their problems to the courts. Resort to judicial remedies, however, is not desirable because the burdens of delay and lost educational opportunity are ultimately borne by the child.

D. Fiscal Failures

In *Armstrong v. Kline,*[155] plaintiffs successfully challenged the provision of the statute that required the Commonwealth to fund special education programs for only 180 days per year. The court's "ultimate factual finding" was that the 180-day rule precluded plaintiffs "from receiving an education that is likely to allow them to reach their reasonably set educational goals with respect to self-sufficiency . . . ."[156]

The *Armstrong* decision is of considerable benefit to those exceptional children whose needs require a year-round program of education and training. This decision fails, however, to cure other financial problems inherent in the placement procedure. Tuition ceilings remain in effect and impact most severely on those whose financial need is greatest.[157] The propensity of school districts to disclaim responsibility for the education of a particular child is, in fact, often based on these financial considerations.[158] Educating the handicapped is expensive; on the average a state must spend twice as much to provide an education for a handicapped child as it does for a nonhandicapped student.[159] Moreover, EHCA provides only about one-fourth of the added expense to eligible states.[160]

Several consequences flow from the cost factors involved in educating exceptional children. At best, school district and IU officials tend to develop IEPs based on existing resources available within the district rather than on the needs of the child.[161] A tendency to en-

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155. 476 F. Supp. 583 (E.D. Pa. 1979).

156. *Id.* at 600.

157. Halderman v. Pittenger, 391 F. Supp. 872, 875 (E.D. Pa. 1975). *See* note 69 *supra. See also* Scavella v. School Bd., 363 So. 2d 1095 (Fla. 1978) (statutory "cap" on tuition payable by district is constitutional, but cannot be invoked to deny handicapped child a "reasonable opportunity" to receive free education); Elliot v. Board of Educ., 64 Ill. App. 3d 229, 380 N.E.2d 1137 (1978) (statutory ceilings on tuition payments violated education article of state constitution).

New York has no tuition ceilings, but a parent with adequate financial resources may be required to contribute to the private school *maintenance* costs of his handicapped child. *See, e.g.,* Levy v. City of New York, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976); *In re* Butcher, 82 Misc. 2d 666, 372 N.Y.S.2d 514 (1975); *In re* Davis, 82 Misc. 2d 659, 370 N.Y.S.2d 351 (1975); *In re* Stein, 81 Misc. 2d 91, 365 N.Y.S.2d 450 (1975). *But see In re* Downey, 72 Misc. 2d 772, 340 N.Y.S.2d 687 (1973).

158. *See generally* Part IV(B) *supra.*

159. Miller & Miller, *supra* note 40, at 17. *See generally* Benjamin & Blair, *supra* note 83.

160. Miller & Miller, *supra* note 40, at 17.

161. In one case the Department of Education determined that a school district's recommendation that a child be placed in a private school was based on the financial inability of the district to provide a suitable program. Opinion of the Secretary of Education in Brief for Appellant at 32, West Chester Area School Dist. v. Commonwealth, Secretary of Educ., 43 Pa.

courage parents to accept the suggested IEPs results.[162] Less justifiable is the failure of school officials to actively seek out, evaluate, and prepare appropriate, although costly, programs for exceptional children.[163]

The state, of course, has a "significant interest" in restricting the use of costly programs and facilities to those who demonstrate real need.[164] Courts directly confronted with the issue, however, have maintained that cost is not a defense to the denial of education rights to exceptional children, and when adequate funds are not available to finance all required programs, existing monies must be expended equitably.[165] In the final analysis the allocation of finite resources is a matter for the legislature. Tuition ceilings and cost-effective IEPs are perhaps inevitable consequences of the fiscal limitations of state budgets.[166]

E. Right to Treatment

Pennsylvania recognizes that exceptional children "have greater need for formal education since they are less likely than ordinary children to learn and to develop informally."[167] Yet Pennsylvania effectively denies treatment of the very mental or physical debilitation that gives rise to the exceptional child's "greater need."[168] The

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Commw. Ct. 14, 401 A.2d 610 (1979). In another case a district maintained that "existing aides and resources could not be used appropriately if the parents' requests for a full-time aide and therapy [were] written into the IEP." Complaint at (Exhibit A) 7, Pecunas v. Kline, No. 78-3133 (E.D. Pa., filed Sept. 19, 1978). *See also* Note, *supra* note 12, at 1109-10.

162. Miller & Miller, *supra* note 40, at 5-6.

163. *See generally* Part IV(A) *supra.*

164. *Cf.* Parham v. J.R., 442 U.S. 584 (1979) (the Supreme Court considered a state's interest in the use of its mental health facilities).

165. *See, e.g.,* Lora v. Board of Educ., 456 F. Supp. 1211, 1293 (E.D.N.Y. 1978); Mills v. Board of Educ., 348 F. Supp. 866, 876 (D.D.C. 1972).

166. "It would be unthinkable . . . to suggest that confronted with economic strictures State government is powerless to move forward in the fields of education and social welfare with anything less than totally comprehensive programs." *In re* Levy v. City of New York, 38 N.Y.2d 653, 660, 345 N.E.2d 556, 560, 382 N.Y.S.2d 13, 17 (1976).

167. Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975).

168. When an exceptional child is placed in an approved private school the only allowable costs are those for tuition and maintenance. PA. STAT. ANN. tit. 24, § 13-1376(a) (Purdon Supp. 1979-80).

Arguably, the School Code, rather than denying treatment, merely does not provide for it, and treatment can be obtained elsewhere. Several considerations, however, militate against acceptance of this argument. The expense of private psychiatric and medical treatment may preclude the poor from obtaining needed care. Although other state and local service agencies provide treatment and therapeutic services, these may often be inadequate. Specialized services may not be available, and the agency may not provide for the needed coordination and continuity between its service and the child's educational program. Social service agencies may condition treatment on the active role of a reluctant parent. The difficulties may be exacerbated when the child is placed in a private facility hundreds of miles from home. Reason dictates that the only viable treatment available is through the private facility.

In West Chester Area School Dist. v. Commonwealth, Secretary of Educ., 43 Pa. Commw. Ct. 14, 401 A.2d 610 (1979), the Secretary approved the educational placement of a socially and emotionally disturbed boy in a day program on the condition that the parents secure and

"medical problems" of handicapped children "do not qualify for treatment in an educational setting . . . ."[169] The Department of Education "eschews any attempt at *treatment* of mental, physical, or emotional disorders in public school children as a welfare problem . . . ."[170] The crucial issue thus becomes whether educational programs can be effective in the absence of concurrent treatment.

Fortunately, two trends point to the possible development of a right to treatment for exceptional children. First, the right to treatment has been established in a variety of situations in which individuals have been placed in residential institutions.[171] Second, the Supreme Court has determined that students who are incapable of benefitting from the education made available to them "are effectively foreclosed from any meaningful education."[172] When right to treatment cases are read in conjunction with the education cases, a right to treatment for exceptional children clearly emerges.

The few courts that have squarely confronted the issue have provided limited substance for the right to treatment in a purely educational context. Two courts have unequivocally rejected the idea.[173] In *Lora v. Board of Education of the City of New York,*[174] however, the court invoked the right to treatment when children with emotional problems were removed from the public schools and reassigned to "special day schools." Despite its particular facts, *Lora*[175] certainly "invites broader applications of the right to treatment."[176] School children with mental and physical handicaps present dual

actively support necessary psychiatric therapy. Although the Secretary's aims were laudatory, the record in the case indicated that the parents were unlikely to fulfill their responsibility. *See* Brief for Appellants at 13-14, *id.*

169. Complaint at (Exhibit A) 10, Pecunas v. Kline, No. 78-3133 (E.D. Pa., filed Sept. 19, 1978).

170. Brief for Respondent [School District] at 2, O'Grady v. Centennial School Dist., 43 Pa. Commw. Ct. 287, 401 A.2d 1388 (1979).

171. *See, e.g.,* Lora v. Board of Educ., 456 F. Supp. 1211 (E.D. N.Y. 1978) (students with emotional problems in special day schools); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972) (training school for boys); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (training school for boys); Wyatt v. Stickney, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), and 344 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderbelt, 503 F.2d 1305 (5th Cir. 1974) (mentally retarded committed to state school). *See also* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1314-20 (E.D. Pa. 1977) (retarded residents of state institution have right to "habilitation"). *But see* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 759 (E.D.N.Y. 1973).

172. Lau v. Nichols, 414 U.S. 563, 566 (1974). The case addressed the failure of the San Francisco school system to provide English language instruction to non-English speaking Chinese students.

173. Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1978); Guempel v. State, 159 N.J. Super. 166, 387 A.2d 399 (1978).

174. 456 F. Supp. 1211 (E.D.N.Y. 1978).

175. The students' emotional problems resulted in "severe acting-out and aggression in school." The court appeared to regard the reassignment of these students as something akin to a disciplinary proceeding entailing an involuntary loss of liberty.

176. *See* Case Comment, *The Right to Treatment and Educational Rights of Handicapped Persons: Lora v. Board of Education,* 31 STAN. L. REV. 807, 811 (1979).

needs for special education and treatment. Neither need can be effectively satisfied at the expense of the other.

V. Conclusions and Recommendations

The *PARC* mandate that all handicapped children in Pennsylvania receive an appropriate free education has been substantially weakened since 1972. The erosion of this mandate is evidenced by administrative indolence in affirmatively implementing statutory and judicial directives, insensitive application of inflexible regulations dealing with handicap classifications and due process procedures, the Commonwealth's questionable ability and desire to shoulder the financial burdens of educating the handicapped, and the lack of a total education policy containing provisions for treatment.

Successes have certainly occurred because a greater number of exceptional children are presently receiving educational services than a decade ago. But any assumption that the task is complete is foolhardy.

Numerous remedies are possible. First, the concept of mainstreaming must be re-evaluated by educators and legislators. Despite its laudable original purpose, the device has sometimes forced exceptional children into the mainstream because a more appropriate program is either too expensive or not readily available. Second, the statutory classification of exceptional children that forms the basis for the distribution of educational programs must be relaxed to allow for a flexible response to parental and local district concerns. Third, the legislature must thoroughly revise due process procedures to provide for a greater parental voice. The entire hearing procedure should be modified for genuine impartiality, and specifically, the Department of Education must be relieved of its responsibility for administering due process safeguards. One alternative may be the creation of an independent body, minimally appended to the Department, with sole responsibility for conducting hearings.[177] Fourth, the Commonwealth's financial responsibility for both the education and treatment of exceptional children must be clarified and, if possible, expanded. Tuition ceilings should be abolished, or at least implemented on a sliding scale basis to aid poorer families.

The most important remedy, however, is immune from legislation. The "system" must realize that an education for the exceptional child is a matter of right, and not a display of governmental largesse. Moreover, "educators must cease being preoccupied with having a smoothly functioning system, and instead, must refocus

177. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 15, § 1N (West).

their attention on the individual student."[178] Accordingly, the role of the legal profession in the handicapped child's right to an education is the enforcement of bureaucratic respect for the handicapped child and his rights.

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178. *Appropriate Education, supra* note 9, at 682.